Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2002

GERALD FRANK PLUNK
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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38 pp

I. QUESTIONS PRESENTED FOR REVIEW.

1. Can the court incarcerate a defendant for violation of an alleged offense of incarceration under an indictment that is constitutionally and jurisdictionally defective, i.e., refers only to criminal forfeiture provisions and not the incarceration provisions (elements) of the statute, and as to which there was no grand jury deliberations or findings, in violation of due process, equal protection, and the right to a grand jury indictment and protection of a grand jury return of a true bill?

2. May the government force a defendant to forego one United States Constitution Fifth Amendment protection (self-incrimination) to preserve other constitutional rights (5th, 6th, and 14th Amendments; double jeopardy, due process, right to counsel and protection against punitive taking of property)?

3. Where the government makes a tactical decision to force a defendant to face parallel 21 U.S.C. § 841 et seq. criminal drug prosecution and forfeitures and punitive 21 U.S.C. § 881 civil forfeitures based on the same offenses, said forfeitures factually, tactically, statutorily and procedural in personam under United States v. Ursery, 518 U.S. 267 (1996), with the "purpose or effect" of punishing a defendant (Id. at 289 n.3) and in fact punishes a defendant by forfeiting his property due to his forced decision to forego a potentially incriminating claim and defense in the punitive civil forfeitures as a result of the "Hobson's choice" presented by the government's tactical decision to "force a fight on two fronts" do the doctrines of fundamental fairness, due process and double jeopardy preclude the subsequent criminal prosecution?

4. Does it violate fundamental fairness and due process of law to force a defendant to forego a defense to punitive administrative forfeitures to preserve fifth amendment privileges based upon existing law (i.e., existing case law interpretation and restrictive application of "limited use immunity" under Simmons v. United States, 390 U.S. 377

(1968), and then based upon a change in the law (i.e., United States v. Cretacci, 62 F.3d 307 (9th Cir. 1995) cert. den'd, 518 U.S. 1007 (1996), retroactively deny double jeopardy protection notwithstanding prior punishment?

5. When a defendant has suffered punitive in personam forfeitures of his property under United States v. Ursery, 518 U.S. 267 (1996), can he then be placed in jeopardy of subsequent prosecution and punishment, and tried, convicted and sentenced to two life terms based on the same offenses and evidence that were the basis of the forfeitures?

6. Does it violate Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), Kumho Tire Co. v. Charmichael, 526 U.S. 137 (1999) the district court's duty to serve as "gatekeeper" to protect the jury from undue influence to allow an investigating officer to testify to "junk science" under the guise of an "expert" as to his present trial-held opinion as to the purported specific meaning of alleged "code words" on wire taps and in a "drug ledger" (and thus his opinion as to the ultimate issue and the defendant's guilt, i.e., the defendant speaker's alleged criminal state of mind, acts and intent) where such an opinion has been colored and refined after debriefing of alleged co-conspirators and where such opinion has no adequate basis under Daubert and Kumho Tire?

7. Does it violate due process and equal protection to fail to consider parity in sentencing of co-defendants under the teachings of Koon v. United States, 518 U.S. 81 (1996)?

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Petitioner, Gerald Frank Plunk, respectfully prays a Writ of Certiorari issue to review the judgment herein of the United States Court of Appeals for the Ninth Circuit, which denied a certificate of appealability on Petitioner's action under 28 U.S.C. § 2255.

IV. REFERENCE TO OPINIONS IN THE CASE.

The Judgment of the United States Court of Appeals for the Ninth Circuit was rendered in an unpublished order filed November 27, 2002 in Ninth Circuit No. 02-35573. [Appendix (hereinafter "App.") 2] Petitioner's Petition for Reconsideration was denied January 21, 2003. [App. 1] The Honorable John W. Sedwick's unpublished findings and conclusions were entered May 22, 2002 in United States District Court Alaska Case No. CV-00-00093 (JWS). [App. 55] Magistrate Judge John D. Roberts' unpublished Report and Recommendation was entered March 5, 2002, [App. 66] and his unpublished Final Recommendation was entered April 8, 2002, [App. 63] both in DC No. CV-00-00093 (JWS). Mr. Plunk's civil habeas corpus litigation under 28 U.S.C. § 2255 will hereinafter be referred to as "Plunk III."

A prior direct appeal culminated in a published opinion filed in Ninth Circuit No. 96-30363, arising from District Court of Alaska No. CR-94-0036 JWS, on August 28, 1998, which is reported at 153 F.3d 1011 (9th Cir. (Alaska) Aug. 28, 1998), cert. den'd, 526 U.S. 1060 (1999), and a companion unpublished memorandum opinion of said date (hereinafter "Plunk II"). [App. 3; 46] In prior relevant proceedings (hereinafter "Plunk I"), the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit was rendered in an unpublished memorandum opinion filed October 17, 1995, in Ninth Circuit Nos. 94-30421 and 94-30422, 1995 WL 619299, cert. den'd, 517 U.S. 1188 (1996). [App. 49] The Honorable John W. Sedwick's unpublished findings and conclusions were entered November 17, 1994 in United States District Court Alaska Case No. CR-94-036-01 (JWS). [App. 113] United States Magistrate John D. Roberts' Recommendations were entered November 4, 1994 in No. CR-94-036-01 (JWS).

[App. 127]

V. GROUNDS FOR JURISDICTION.

This Court has jurisdiction to issue a Writ of Certiorari under 28 U.S.C. § 1254. The Petition is timely as the initial Order was filed November 27, 2002; a timely Petition for Reconsideration was denied January 21, 2003.

VI. CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED.

The case involves the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, 19 U.S.C. § 1609, 21 U.S.C. § 841, et seq., 21 U.S.C. § 881, et seq., 28 U.S.C. §§ 2253 and 2255. The text of same and related jurisdictional statutes and procedural rules are set out in the Appendix [App. 220-266]

VII. STATEMENT OF THE CASE AND BASIS FOR JURISDICTION IN COURT OF FIRST INSTANCE.

The petitioner seeks review of the Ninth Circuit's denial of his request for a certificate of appealability pursuant to 28 U.S.C. § 2253 and Ninth Circuit Rule 22-1, from the Order from Chambers entered by John W. Sedwick, United States District Court Judge, on May 22, 2002, [App. 55] which denied Mr. Plunk's petition for relief under 28 U.S.C. § 2255 and/or under his rights to habeas corpus and *coram nobis* under the U.S. Constitution, and under 28 U.S.C. § 2241. The district court had jurisdiction pursuant to 28 U.S.C. § 2255, the Fifth, Sixth and Fourteenth Amendments, and Art. III, § 2, cl. 1 of the United States Constitution.

A. Relevant Facts and Proceedings.

Mr. Plunk is serving life terms for two convictions of 21 §§ 841(a)(1) and 846 offenses (distributing and conspiracy to distribute cocaine) which were the basis for four prior in personam punitive forfeiture(s) of his property within the holding of United States v. Ursery, 518 U.S. 267 (1996).

The indictments used to try, convict, and incarcerate Mr. Plunk contained constitutional and jurisdictional defects. The first indictment inadequately charged Mr. Plunk with one count of conspiracy to distribute cocaine. [App. 188] A superseding indictment inadequately charged one count of continuing criminal enterprise, counts involving the use of a communication facility, counts of possession with intent to distribute, and a count of conspiracy to distribute cocaine. [App. 171]

Mr. Plunk's concurrent sentences of life without parole, were imposed for convictions on Counts 1 and 11 under the superseding indictment. Count 1 (conspiracy to distribute cocaine) merely alleged a "violation of 21 U.S.C. § 841(a)(1) and 846." [App. 172-78] Count 11 merely alleged a "violation of 21 U.S.C. § 841(a)(1)." [App. 186] The only penalty provision or statutory element included in the superceding indictment and found by the grand jury true bill was the criminal forfeiture penalty element under 21 U.S.C. § 853. [App. 180-82] Thus, Counts 1 and 11 merely alleged criminal forfeiture charges.

Nowhere in the indictment are the penalty provisions or statutory elements of § 841, i.e. § 841(b), set out. There is no reference in Counts 1 or 11 to 21 U.S.C. § 841(b) to show the grand jury was presented, or found, any substantive statutory criminal offense with the potential penalty of incarceration, nor notice to Mr. Plunk or counsel of same. Clearly set out in the indictment are the Government's forfeiture intentions, stating: "[I]t is the intent of the U.S., pursuant to Title 21, USC § 853(p), to seek forfeiture of any properties of the defendants up to the value of the properties listed above ... [a]ll pursuant to 21 U.S.C. §§ 853." [App. 182] Thus, the indictment is insufficient to show grand jury presentment or findings, a grant of jurisdiction, or notice to Mr. Plunk and counsel, of a substantive statutory criminal offense allowing potential incarceration under the penalty provisions of 21 U.S.C. § 841(b). That is, a reasonable reading of the indictment only confers jurisdiction on the court and notice to the defendant and counsel of charges Mr.

Plunk violated § 841(a) and his potential punishment for same is forfeiture of his property under §§ 853 and 848.

Criminal search and arrest warrants resulted in the search of Mr. Plunk's home and his physical arrest. Items taken from the home at the search and a watch stripped from his person at the arrest were the subject of four in personam administrative forfeitures which constituted punishment and were based on the same probable cause and offenses for which he was subsequently tried, convicted and sentenced. Due to the tactical decision to institute parallel in personam punitive forfeitures and a criminal indictment for the same alleged offenses, including a criminal 21 U.S.C. § 848 and/or § 853 forfeiture count, Mr. Plunk and his counsel were faced with a "Hobson's choice," i.e., "faced a battle on two fronts" and thus were forced to preserve Mr. Plunk's Fifth Amendment privileges by foregoing a formal claim of ownership or defense to the in personam punitive administrative forfeitures. At the time of such forced decision (to wit: preserving one basic constitutional right (self-incrimination) by foregoing others (due process and right to be free from punitive forfeiture and punishment)), no ruling of the United States Supreme Court or the circuits had authorized any type of "limited use immunity" under the doctrine of Simmons v. United States, 390 U.S. 377 (1968), as to potentially incriminating claims of ownership made by a property owner and defendant in punitive forfeiture proceedings under 19 U.S.C. § 1609 and 21 U.S.C. § 881. In fact, the case law was to the contrary.

Substantial portions of the government's prosecution were initially dismissed by the United States District Court on double jeopardy grounds due to said punitive in personam forfeitures. See, Order from Chambers [App. 113]; Magistrate's Recommendation [App. 127] After such partially successful jeopardy challenges, and cross interlocutory appeals by the defendant and the government, a Ninth Circuit panel, in the previously unpublished opinion in the instant case entitled United States v. Plunk, No. 94-30421 and 94-30422, 95 WL 619299 (9th Cir. October 17, 1995), cert. den'd 517 U.S. 1188 (1996) ("Plunk I"), under United

States v. Cretacci, 62 F.3d 307 (9th Cir. 1995), cert. den'd 518 U.S. 1007 (1996), improperly held Mr. Plunk had not been "punished" since he had allegedly impliedly "abandoned" the property in the face of a punitive forfeiture due to the failure to file a claim. The Plunk I court avoided the "Hobson's choice" issue.

In United States v. Plunk, 153 F.3d 1011 ("Plunk II"), the Ninth Circuit then refused to interpret or apply the ruling in United States v. Ursery, 518 U.S. 267 (1996), notwithstanding the fact Mr. Plunk pointed out, and the record demonstrates, that "factually, tactically, statutorily and procedurally, the subject administrative forfeitures ... were in fact in personam criminal forfeitures tactically directed at [Mr. Plunk] to punish him," so as to fall within the Court's holding at n.3 of Ursery that such forfeitures gave rise to a double jeopardy bar and afford protection against subsequent prosecution and punishment. Plunk II, at 1029-1030.

In Plunk II, the Ninth Circuit refused to address the punitive versus remedial aspects of the forfeitures and the resulting double jeopardy protection afforded under Ursery and the "implications" of the "tactical" choice of the government to present the defendant with the "Hobson's choice" by "forcing a fight on two fronts"[1] by ignoring the Ursery decision, incorrectly holding that it was not new or intervening Supreme Court precedent, and claiming the law of the case (i.e., the Cretacci "waiver" or "abandonment" holding) precluded such analysis.

Finally, in the habeas corpus proceedings in Plunk III, the district court ruled that the relitigation doctrine barred review of the double jeopardy claim. Report and Recommendation [App. 100]; Order from Chambers [App. 59] The Ninth Circuit refused to issue a certificate of appealability in Plunk III. Order [App. 2]

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[1] I.e., to deny him both his Fifth Amendment right to remain silent and his Sixth Amendment right to counsel.

The Supreme Court should exercise its authority and hold squarely that in light of Ursery, given the importance of the "Hobson's choice" and "fight on two fronts" issues as they impinge on the Fifth Amendment protection against self-incrimination and his Sixth Amendment right to counsel, that where there was no prior notice to counsel or to the defendant that "Simmons use immunity" would be honored, in fact the defendant or his counsel did not "knowingly" or "voluntarily" waive or abandon his due process or double jeopardy rights and thus Mr. Plunk is protected from subsequent prosecution or punishment by double jeopardy given the prior punishment he suffered.[2]

Moreover, the Court must recognize that under the superceding indictment, which failed to properly present to the grand jury and charge or show a grand jury true bill finding of the statutory elements of an offense of incarceration as to the counts of conviction, the district court lacked the jurisdiction to convict or incarcerate Mr. Plunk, and the life sentences must be vacated.

In a trial fraught with numerous errors, the government's evidence was based on: (1) seven cooperating alleged co-conspirators testifying under grants of immunity and/or pursuant to plea bargains or downward departure agreements to escape significant punishment (including mandatory life terms); and (2) the improper and unsubstantiated "junk science" and "expert opinion" testimony of an investigating officer, Detective Speziale, which violated Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Based on a purported Evidence Rule 702 "specialized knowledge" exception, such unsupported and unscientific "expert opinion" was given to the jury in derogation of the duty of the trial court under Daubert to serve as a "gatekeeper" against "junk science."

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[2] It is clear from the record Mr. Plunk's alleged waiver was not voluntary insofar as his failure to file a claim of ownership was on counsel's advice that such inaction was necessary to preserve his Fifth Amendment rights. See, Affidavits of Mr. Plunk and Counsel in Support of Double Jeopardy Motion [App. 142, 145, 147]

After trial, having lost via a judgment of acquittal as to certain portions of Mr. Plunk's property on the criminal forfeiture count under the indictment, the government proceeded to obtain civil in personam punitive forfeiture of the same property, i.e., several of Mr. Plunk's airplanes and substantial pieces of real property. Again, counsel and Mr. Plunk were faced with the "Hobson's choice" due to the parallel and sequential prosecutions and Mr. Plunk's pending appeal, and the government resisted a request for stay, the court refused to grant same, and the court held Mr. Plunk's assertion of his Fifth Amendment privileges meant he failed to refute a showing of probable cause in the subsequent civil forfeiture actions and forfeitures should issue.

Accordingly, based on the same criminal offenses, allegations and evidence, Mr. Plunk has been subjected to four initial in personam punitive forfeitures of property seized from his person and his house, a criminal trial with conviction and two life sentences, and after a defense judgment of acquittal as to forfeiture, two subsequent post-verdict punitive in personam forfeitures of numerous airplanes and pieces of real property,[3] and has never had an opportunity to defend himself free from such a "Hobson's choice."

Thus, the instant conviction, forfeitures and sentence were obtained in total violation of due process, double jeopardy, the right to counsel and against self-incrimination, and to the jurisdictional and constitutional protection of a grand jury indictment and grand jury finding of a true bill, under the Fifth, Sixth and Fourteenth amendments, Evidence Rule 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The Petition for Writ of Habeas Corpus under 28 U.S.C. § 2255 must be granted.

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[3] In that regard, new evidence now exists as government has now conceded via return of $350,000, Mr. Plunk's property was forfeited in an illegal manner via use of the "Hobson's choice" in litigation which was the subject of the appeal in United States v. Twelve Pieces of Property, 54 Fed. Appx. 461 (9th Cir. 2003).

VIII. REASONS FOR GRANTING CERTIORARI.

A. It Violates Fundamental Fairness, Due Process, the Right to Remain Silent and the Right Against Double Jeopardy to Force a Criminal Defendant to Give up Certain Constitutional Rights (Double Jeopardy and Due Process Rights to be Free From Forfeiture of One's Property and the Sixth Amendment Right to Counsel) in Order to Preserve Another (Right Against Self-Incrimination).

The record clearly demonstrates the government made a tactical choice to seek punitive in personam punitive civil forfeitures against Mr. Plunk and his property at the time he was facing a criminal indictment so as to present him and his counsel with a "Hobson's choice" and "force a fight on two fronts." The foundation of the Fifth Amendment prohibition against such a government tactic and such parallel or successive prosecutions which are barred by double jeopardy traces its origins to Greek and Roman law. See United States v. $405,089.23 in U.S. Currency, 33 F.3d 1210 (9th Cir. 1994), amended, 56 F.3d 41 (9th Cir. 1995), reversed sub. nom. United States v. Ursery, 518 U.S. 267 (1996).

The record clearly demonstrates from the outset Mr. Plunk has been the subject of in personam forfeitures and penalties within the meaning of Ursery. Despite this, no court has ever fully analyzed Mr. Plunk's double jeopardy claims under Ursery.

1. The Double Jeopardy claim is not procedurally barred.

The district court improperly ruled in Plunk III that review of the double jeopardy claim under 28 U.S.C. § 2255 was barred as the claim had allegedly been previously

litigated.[4] Report and Recommendation [App. 100]; Order from Chambers [App. 59] The Ninth Circuit refused to issue a certificate of appealability in Plunk III. Order [App. 2]

In fact, neither the relitigation doctrine[5] nor the "law of the case" doctrine barred review of the double jeopardy issue under 28 U.S.C. § 2255 in Plunk III, and the Plunk II panel's application of the "law of the case" doctrine to duck the issue under Ursery was erroneous.

(a) The "law of the case" doctrine was erroneously applied to avoid the issue in Plunk II and Plunk III.

While in Plunk II the panel cited the "law of the case" doctrine,[6] that doctrine is not an absolute bar,[7] and further, given the circumstances of this case, was not (in Plunk II) and is not (Plunk III) a bar.

The Ursery Court made two unequivocal statements in its holding, namely that: (1) forfeiture penalties which are "punitive" in "purpose or effect" are in personam and are distinct from in rem civil forfeitures which are purely remedial," and accordingly, such in personam punitive actions give rise to a double jeopardy bar; and (2) that even some nominally "in rem" civil forfeitures would constitute

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[4] It is unclear whether the court relied on "law of the case" or the relitigation doctrine. As discussed, infra, neither prevented review of the properly preserved, exhausted constitutional issue under § 2255.

[5] "Although principles of *res judicata* do not bar a prisoner from relitigating on habeas corpus or under § 2255 or on coram nobis issues raised in the original appeal, a district court may refused to entertain a repetitive petition absent a showing of manifest injustice or a change in law." Polizzi v. United States, 550 F.2d 1133, 1135-36 (9th Cir. 1976).

[6] Plunk II 153 F.3d at 1029.

[7] [T]he prior decision of legal issues should be followed on a later appeal unless (1) the evidence on a subsequent trial was substantially different, (2) *controlling authority has since made a contrary decision of the law applicable to such issues*, or (3) the decision was clearly erroneous and would work a manifest injustice. Kimball v. Callahan, 590 F.2d 768, 771-72 (9th Cir. 1979) (internal quotations omitted) (emphasis added).

"punishment" within the meaning of the double jeopardy clause bar to further prosecution, "where the 'clearest proof' indicates that an in rem civil forfeiture is so punitive either in purpose or effect' as to be equivalent to a criminal proceeding...." Ursery at 289, n.3.

In Plunk II the panel recognized the n.3 language from Ursery at 153 F.3d 1030 and acknowledged these two clear teachings of Ursery, yet the court refused to rule on Mr. Plunk's argument that "factually, tactically, statutorily, and procedurally, the subject administrative forfeitures...were in fact in personam criminal forfeitures tactically directed at [him] to punish him."[8] Id. The panel in Plunk II improperly held at 153 F.3d 1029 that consideration of Mr. Plunk's Ursery double jeopardy claims were barred by the decision in Plunk I, wherein the court had mistakenly found that under Cretacci, Mr. Plunk's coerced decision to forego filing an administrative claim and contesting the civil forfeitures to protect his Fifth Amendment privilege in the pending criminal case meant the property was "abandoned," "the forfeiture of Plunk's abandoned property was not a 'punishment,' and thus Plunk was not placed in jeopardy." [App. 52] This is a misapplication of the law of the case doctrine. Furthermore, it ignores the effect of Ursery on

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[8] Mr. Plunk set out in more detail to the District Court and in his briefing to the Ninth Circuit in the Plunk II appeal in both the opening brief and the reply brief that due to the reasons for and nature of the seizures (via a criminal arrest and search warrant) and the tactical reasons and purpose for same, and the manner in which the government used Title 19 U.S.C. §§ 1602-1609, 21 C.F.R. 131671-131681 and Title 21 U.S.C. § 881 to obtain the administrative forfeitures they were procedurally and substantively, in both purpose and effect, in personam criminal punitive forfeitures. The manner and purpose in which said statutes were used and the fact that the property was initially seized under criminal search and arrest warrants and the manner in which the property was administratively forfeited at the time there was a parallel criminal forfeiture action under the CCE count and the government's post-acquittal attempt to institute further forfeiture actions constitute the "clearest proof" the referenced forfeitures were in fact "punitive" in both "purpose" and "effect" under Ursery. As discussed in the Plunk II briefing, they were thus in personam both substantively and procedurally and likewise were in personam attempts to punish Mr. Plunk as a successive ploy by the government to gain tactical advantage.

Plunk I and Cretacci, and overlooks material facts concerning the in personam punitive nature of the forfeitures and "Hobson's choice."

At the time of the court's ruling in Plunk I, the relevant law in the Ninth Circuit as to the double jeopardy implications of civil forfeitures was $405,089.23. The Cretacci and Plunk I and II panels denied double jeopardy protection under the transparent subterfuge that there had been voluntary "abandonment" of the property in the punitive administrative proceedings, notwithstanding that under then-existing case law, i.e., the "limited use immunity" in Simmons afforded potentially incriminating statements and claims of ownership made to convey standing in Fourth Amendment suppression motions, there was no protection for a property owner claiming incriminating property in a punitive administrative forfeiture proceeding.[9]

This patently frivolous and unsupported claim of "waiver" and "abandonment" cannot be said to be founded on any evidence of a "knowing" or "voluntary" relinquishment of any constitutional right. See Johnson v. Zerbst, 304 U.S. 458 (1963). Via such judicial "sleight of hand" the Plunk I panel avoided the Ninth Circuit holding in $405,089.23, and the Plunk II panel via "law of the case" avoided the doctrine enunciated in n.3 in Ursery that punitive in personam forfeiture conveys the protection of a jeopardy bar to subsequent prosecution or punishment. However, in light of Ursery and the bad law of Cretacci, the Plunk II panel needed to reach the merits of the claim to avoid a manifest in justice, thus "law of the case" did not apply.

In addition, despite the district court's ruling in Plunk III, in light of "contrary intervening controlling authority," the

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[9] This Court has consistently held that "Simmons use immunity" only applies to the use of pre-trial suppression hearing evidence. See, e.g., McGautha v. California, 402 U.S. 183, 210-32 (1971); United States v. Kahan, 415 U.S. 239 (1974). Even when Simmons is implicated, statements made in a suppression hearing may be used to impeach a defendant who takes the stand at trial. United States v. Beltran-Gutierrez, 19 F.3d 1287 (9th Cir. 1994).

"law of the case" excuse can no longer be used.[10] In United States v. Scrivner, 189 F.3d 825 (9th Cir. 1999) (hereinafter Scrivner II"), the Ninth Circuit has now clearly retreated from Cretacci, treating the so-called "implied Simmons use immunity" holding, which was the cornerstone of the Plunk I and Plunk II holdings regarding the purported "abandonment" of the property or "waiver" of double jeopardy rights, as dicta. Scrivner II, 189 F.3d at 828. In Scrivner, the court ruled initially in Scrivner I and again in Scrivner II that in fact a defendant faced with such a "Hobson's choice" made a potentially incriminating claim of ownership in a forfeiture proceeding at his peril, there was no "Simmons use immunity," and the admissions could be used against him in a criminal proceeding.

Thus, Cretacci, upon which Plunk I relied, has been largely abandoned, and the Scrivner decision constitutes contrary intervening controlling authority.[11] Accordingly, any reliance by the district court in Plunk III on the "law of the case doctrine" was erroneous.

(b) The relitigation doctrine does not bar review of the double jeopardy issue under 28 U.S.C. § 2255.

No court to date, be it the magistrate, the district court, or any appellate court, has made a proper finding as to the "purpose" or "effect" elements of Ursery criteria regarding *in rem* forfeitures being punitive against Mr. Plunk. Thus, not only was there no procedural or substantive bar to the district court or the appellate court doing so, but the courts were required to consider such issue to allow Mr. Plunk his constitutional rights and his rights under 28 U.S.C. § 2255. They did not do so.

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[10] The doctrine does not apply where "controlling authority has since made a contrary decision of the law applicable to such issues." Kimball v. Callahan, 590 F.2d at 771-72.

[11] Note the Scrivner II (9/1/99) decision was subsequent to both Plunk I (10/17/95) and Plunk II (8/28/98). Scrivner I was decided on 7/6/95, but was an unpublished opinion at the time of Plunk I and Plunk II.

Likewise, the Plunk II decision never reached the Ursery "purpose or effect" analysis. Plunk II held that Plunk I was the "law of the case," but again did so on the "abandonment" analysis, holding the property had been "abandoned" and thus there had been no punishment, so as to defeat a double jeopardy claim. 153 F.3d 1030 Plunk II specifically stated that "Ursery never spoke to this issue nor did its holding affect it." Id. Accordingly, because the Plunk II panel did not reach the analysis, the relitigation doctrine does not bar review of the issue under § 2255.

Thus, despite the fact that Mr. Plunk has presented his double jeopardy claim to the Ninth Circuit now on three occasions, there has never been an analysis of whether under Ursery, if the government's motive regarding the purpose or effect of seeking the forfeiture is to obtain such "abandonment or waiver" via the tactical advantage of placing a defendant in the position of choosing between his Fifth Amendment Privilege and his double jeopardy rights, it constitutes punishment and a jeopardy event. Plunk I used the bad law of Cretacci to avoid the double jeopardy claim, Plunk II erroneously relied on Plunk I and the "law of the case" doctrine, and the district court in Plunk III used the relitigation doctrine and/or law of the case despite Scrivner II, while the Ninth Circuit refused a certificate of appealability.

When the merits are reached, it is clear that not only was Mr. Plunk punished before his criminal trial by punitive in personam forfeitures of his property directed against him in a personal fashion, but he likewise suffered such punishment after his criminal trial, notwithstanding his criminal conviction and sentence and a successful judgment of acquittal as to the criminal forfeitures in the criminal trial.

To allow this procedure to exist means the government can continue to gain tactical advantage and inflict punishment on defendants who cannot defend themselves or their property by instituting in personam punitive forfeitures as to potentially incriminating property, secure in the knowledge that any competent defense counsel and

defendant, until an acquittal or final resolution of a merit appeal, must forego making administrative forfeiture claims or interposing a defense and thus suffer forfeiture. The government can then claim "abandonment" or "waiver" and avoid the underlying teachings of Ursery.

From the time the Rolex watch was gleefully taken from Mr. Plunk's wrist at his arrest by Detective Speziale under the criminal arrest warrant and the other property was taken from his house under the criminal search warrant with both the seizures and punitive in personam forfeitures based upon the probable cause and offenses encompassed by the criminal indictment and trial, the government as a tactical ploy had focused on him and his property via in personam parallel prosecutions and punitive proceedings.

This forced him and his counsel to "fight on two fronts" and face the "Hobson's choice" of a tactical hardship, i.e., to suffer punitive forfeiture of the property or preserve his Fifth Amendment privileges.

There was: (1) no voluntary abandonment of the property; (2) no waiver of a double jeopardy claim; and (3) a clear "purpose and effect of punishment" under Ursery, such that the in personam focus of the forfeitures constituted double jeopardy punishment.

B. Factually, Tactically, Statutorily and Procedurally, the Forfeitures were In Personam.

In United States v. Ursery, 518 U.S. 267 (1996), the Sixth Circuit was reversed in United States v. Ursery, Case No. 95-345 and the Ninth Circuit was reversed in United States v. $405, 089.23, Case No. 95-346, precisely because the administrative forfeitures at issue were "in rem civil forfeitures" and thus "neither punishment" nor criminal for purposes of the Double Jeopardy Clause." Ursery at 289.

The decision clearly distinguished such in rem civil forfeitures as non-punitive, due to their remedial purpose, and due to the fact that they focused on punishment of the

property as opposed to the person in contrast to "in personam civil or criminal penalties" citing the basic distinction recognized between "in rem civil forfeiture proceedings", which were not punitive and are characterized as remedial and against the property, and "in personam civil or criminal penalties" which are directed against a person and are punitive and thus invoke the double jeopardy clause as enunciated in United States v. One Assortment of 89 Firearms, 465 U.S. 354, (1984).

Accordingly, when one recognizes that factually, tactically, statutorily, and procedurally, the subject administrative forfeitures in the instant matter, which Judge Sedwick properly found were based upon the criminal conduct resulting in Mr. Plunk's conviction, were in personam criminal forfeitures strategically directed at the person of Mr. Plunk to punish him and prejudiced him as to his Fifth Amendment and Sixth Amendment rights, it follows that Mr. Plunk is entitled to the protection of the Double Jeopardy Clause precluding further punishment for same.

The administrative forfeitures in question were in fact in personam and as a tactical choice by the government were directed against Mr. Plunk to punish him. The seizures of the property were pursuant to criminal search warrant and arrest warrant affidavits. The notices of seizures were issued as a conscious punitive tactical ploy by the government, to gain the procedural benefits of 19 U.S.C. § 1602 et seq., as to the lesser standard and shifted burden of proof, and the "Hobson's choice" presented by the resulting threat to Mr. Plunk's Fifth Amendment rights after Mr. Plunk was indicted for such underlying criminal conduct and/or contemporaneous with grand jury proceedings for same. See, Declarations of Forfeiture [App. 151, 153, 155, 157]; Notice of Seizures [App. 159, 162, 165, 168] Significantly in the criminal indictment, in the Count 2 CCE a criminal forfeiture count was alleged under 21 U.S.C. 853(a)(3) which included:

> All property constituting or derived from any proceeds obtained, directly, or indirectly, as well as any properties used, or intended to be used, in any manner or part, to facilitate the commission of controlled substance violations as well as any interest in, claims against, and property or contractual rights offering said defendants a source of influence or control over the continuing criminal enterprise, including, but not limited to, the property described below.

Said "property described below" referred to certain real property, including Mr. Plunk's house, and his personal property (including other cash seized under the search warrant). By virtue of a subsequent bill of particulars the Government specified that the property subject to the in personam 21 U.S.C. § 853 punitive forfeiture also included Mr. Plunk's airplanes.

The planes were the subject of Judge Sedwick's Judgment of Acquittal as to in personam criminal punitive forfeiture which the government appealed in Case No. A-96-30349, but then abandoned the appeal. The government re-instituted the civil action to improperly forfeit the planes although they had lost the in personam punitive criminal forfeiture action.[12]

21 U.S.C. § 881 and, in particular, 21 U.S.C. § 881(d) which is the statutory authorization for the utilization of the summary administrative forfeiture proceedings of 19 U.S.C. § 1602 et seq., only applies to civil in rem (remedial) forfeiture proceedings in certain instances and criminal in personam (punitive) forfeiture proceedings under 21 U.S.C. § 853(b) and (j) in others.

Significantly, 21 U.S.C. § 881(b) provides property would had to have been either seized under "process issued

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[12] In fact, said forfeitures were substantively insufficient, as the Ninth Circuit found. See, United States v. Twelve Pieces of Property, 54 Fed. Appx. 461 (9th Cir. 2003).

pursuant to the Supplemental Rules for Certain Admiralty and Maritime claims" or would have had to have been seized under one of the four exceptions to the requirements of such process.[13]

Clearly, the property in question for which the administrative forfeitures issued was seized under 21 U.S.C. § 881(b)(1), as specifically found by Judge Sedwick. Accordingly, the concluding paragraph of 21 U.S.C. § 881(b) is significant, since that addresses only seizures under exceptions 881(b)(3) and (4), and not 881(b)(1) or (2), as those suitable to institute "proceedings under subsection (d) of this section", i.e. the summary forfeiture provisions of 19 U.S.C. § 1602 et seq. which were utilized herein.

The summary forfeiture positions utilized herein of 19 U.S.C. § 1602 et. seq. were not instituted or authorized under 21 U.S.C. § 881 civil in rem forfeiture since there was no Admiralty/Maritime process issued, the seizures were under a criminal search warrant and/or pursuant to an arrest under a criminal search warrant which meant that the basis for utilizing such summary forfeiture procedures were under 18 U.S.C. § 853(j), i.e. in personam punishment via punitive forfeiture.

Moreover as a matter of constitutional due process, this result is mandated. Having begun criminal search

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[13] (1) the seizure is incident to an arrest or a search under a search warrant or administrative warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this subchapter;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this subchapter.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly. 21 U.S.C. § 881(b) (emphasis added.).

warrant/arrest warrant proceedings against Mr. Plunk, having indicted him, and in light of the interplay between the Fifth Amendment rights and the forfeitures, and the resulting "Hobson's Choice", as a matter of basic due process it is clear that the forfeitures in question were in personam punitive forfeitures under 18 U.S.C. § 853(j) and 881(d) and not in rem remedial forfeitures under 21 U.S.C. § 881(b) and (d), which purpose and effect was to punish Mr. Plunk. In essence the government "severed" for tactical purposes, portions of the forfeiture counts from the indictment and proceeded by way of administrative in personam punitive forfeiture, and summary adjudication, and thus the government is bound by the double jeopardy bar.

It is thus crucial to recognize the important substantive distinguishing factor of Mr. Plunk's case from that of Ursery or $405,089.23. The pre-Cretacci unavailability of "Simmons" use immunity for statements and claims of ownership in forfeiture proceedings forced Mr. Plunk to forego the administrative claims precisely due to concerns of jeopardizing his Fifth Amendment and self-incrimination rights. In Ursery, no such Hobson's choice was procedurally present, since the civil forfeiture proceedings were instituted prior to arrest and indictment. Likewise in $405,089.23, no such Hobson's choice was present, since the forfeiture proceedings were instituted after conviction. Here, it is the very nature of the tactical decision by the prosecution, to wit to institute administrative in personam punitive forfeiture proceedings in the midst of the criminal prosecution that presented said Hobson's choice. In turn this is precisely why the prosecution should suffer a double jeopardy bar having elected to "split out" some property covered by the 21 U.S.C. § 853(a) forfeiture count in the indictment into 21 U.S.C. § 853(j) administrative in personam punitive forfeiture proceedings.

The very fact the property is seized under a criminal search warrant or under an arrest pursuant to a criminal arrest warrant, as in the instant matter, has profound constitutional implications for the defendant, insofar as by virtue of the existence of probable cause as set out in the search warrant,

or indictment and/or arrest warrant applications, the government has focused on the defendant in personam as a criminal defendant target, which in turn has implications for his Fifth Amendment rights should he seek to file and/or assert a formal claim of ownership for the property. Accordingly, it is entirely proper that the statutory scheme as discussed be construed such that if the government utilizes the summary forfeiture administrative procedures under 19 U.S.C. § 1602 to punish a target defendant by forfeiting property belonging to a defendant who has been arrested or indicted, with the attendant advantages to the government of standard and burden of proof, requirement of a formal claim etc., as opposed to the criminal jury trial process of 21 U.S.C. § 853(a), the government likewise should be charged with double jeopardy consequences for the in personam nature of such proceedings. It would be a constitutional and legal fiction to claim that having proceeded with a criminal search warrant or criminal arrest warrant that the focus is "remedial", i.e., in rem against the property as opposed to "punitive", i.e., in personam against the defendant.

In conclusion it is clear, both factually and strategically, due to the purpose and nature of the seizures, the basis for the seizures, the timing of the indictment, seizures, notices and forfeitures, and procedurally and statutorily that the administrative forfeitures in question were a tactical choice by the government under 21 U.S.C. § 853(j), incorporating the provisions of 21 U.S.C. § 881(d), in turn incorporating the provisions of 19 U.S.C. § 1602 et seq. and as such were in personam criminal punitive forfeitures.

Since Judge Sedwick properly found that the crimes on which they were based included Counts 1 and 11, and further the Alaska I Conspiracy charged in the initial indictment, and moreover, since portions of said counts in turn were lessor included offenses/elements of the CCE and phone counts, not only are the instant convictions before the Court jeopardy barred, but likewise the counts as to which the jury was unable to return a verdict are jeopardy barred.

The "bottom line" is that the government, having made

its initial decision to proceed by way of in personam forfeiture of Mr. Plunk's property seized from his person and his home under a criminal arrest warrant and criminal search warrant so as to gain a procedural benefit and tactical advantage via the "fight on two fronts" and the resulting "Hobson's choice," and having obtained its "first bite at the apple" (in personam forfeitures and punishment) is now precluded by the double jeopardy clause from seeking any further criminal prosecution or punishment of Mr. Plunk, having in retrospect decided the "first bite" was insufficient.

C. The Indictment Was Constitutionally Defective as it Failed to Set Out and the Grand Jury Did Not Deliberate on or Find the Appropriate Jurisdictional Basis (Statutory Elements) to Try, Convict, or Sentence Mr. Plunk As to An Offense of Incarceration.

The indictment charging Mr. Plunk failed to properly present to the grand jury an allegation of a criminal offense of incarceration under 21 U.S.C. § 841(b), i.e., an actual quantity-aggravated criminal drug offense or, for that matter, any criminal statutory substantive drug offense allowing incarceration. Rather, the indictment set out the violation section at 21 U.S.C. § 841(a), and the only potential punishment set out was criminal forfeiture under 21 U.S.C. §§ 848 and 853.

Thus, due to the defective indictment the government and district court should have been only able to initiate and/or impose a 21 U.S.C. § 853 criminal forfeiture proceeding against Mr. Plunk. Given the defective nature of the indictment - the failure to present to the grand jury and/or give notice to Mr. Plunk of a statutory offense of incarceration under 21 U.S.C. § 841(b) - the grand jury did not deliberate on or find the necessary statutory elements and the district court lacked jurisdiction to try, convict, sentence or incarcerate Mr. Plunk as opposed to criminally forfeiting his property. Since the judgment under which Mr. Plunk is

confined is jurisdictionally void, he must be released forthwith in accord with his motion under 28 U.S.C. § 2255.[14]

From the time of the Magna Carta, the grand jury "stands between the peasant and the wrath of the king," and the government does not have jurisdiction to try, convict, sentence or incarcerate a citizen but with a proper grand jury true bill finding and indictment, specifically stating a substantive statutory crime with potential of incarceration, with facts to support same, present to and returned in the true bill by the grand jury.

Furthermore, it has been well established since Ex parte Bain, 121 U.S. 1 (1887), that after an indictment has been returned, the substantive charges in the indictment may not be broadened through amendment, except through the grand jury itself.[15] In Schmuck v. United States, 489 U.S. 705 (1989), the Court stated "...it is an ancient doctrine under both the common law and the constitution that a defendant cannot be held to answer a crime not contained in the indictment brought against him."[16]

The recent case of United States v. Cotton, 535 U.S. 625 (2002), while appearing to overrule Ex parte Bain on the indictment issue, is extremely fact specific and is distinguished from the instant case. In Cotton, the Court addressed the issue whether the omission from a federal indictment of a fact that enhances the statutory maximum sentence justifies the vacating of an enhanced sentence. The Court explained "Bain's concept of jurisdiction is not what the term 'jurisdiction' means today, i.e., 'the court's statutory or constitutional *power* to adjudicate the case.'" Cotton, 535 U.S. at 630 (internal citations omitted) (emphasis in original).

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[14] Despite having raised this issue before the district court and the Ninth Circuit in Plunk III, neither court ever addressed same.

[15] See also, United States v. Norris, 281 U.S. 619, 622 (1930); Clyatt v. United States, 197 U.S. 207, 219-220 (1905).

[16] Citing Ex parte Bain, 121 U.S. 1, 10, (1887); Stirone v. United States, 361 U.S. 212, 215-217 (1960); United States v. Miller, 471 U.S. 130, 140, (1985).

Mr. Plunk does not argue that the district court lacked the power to hear the case, but rather that it lacked the power to incarcerate Mr. Plunk upon conviction for a criminal offense of incarceration as opposed to an offense of forfeiture.

The distinction is between subject matter jurisdiction as to property versus subject matter jurisdiction to directly punish and incarcerate the person. The basic constitutional rights protected precisely by the requirement of presentment to a grand jury, deliberation by a grand jury and return of a true bill of a finding of sufficient evidence to try, convict, sentence and incarcerate a defendant, mandate an absolute requirement, that is, both a requirement to obtain jurisdiction over the person for a felony offense, and to provide due process notice to a defendant as to the elements of the precise statutory offense for which he is charged, that the indictment must contain allegations to the statutory provisions and thus factual and statutory elements of same. Accordingly, the grand jury indictment (and the absolute requirement of such statutory and factual elements) serves concurrent and essential constitutional functions. These include notice and presentment to the grand jury for actual deliberation on such essential elements, similarly proof that the grand jury actually considered, deliberated and returned a true bill as to all the elements, and finally, notice to a defendant and his counsel of the statutory offense, i.e., statutory and factual elements with which he is charged. It likewise precludes a variance by the prosecution or petit jury or court to prevent a defendant from facing trial, conviction, sentence, or incarceration on a different basis or offense than pled to the grand jury. These essential requirements thus preserve the right to grand jury protection, due process notice, and the right to counsel. In the instant case, these requirements were only sufficient (in fact can only be read) to confer subject matter jurisdiction over property for a criminal forfeiture with no subject matter jurisdiction over the person for conviction and incarceration.[17]

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[17] Significantly, in Cotton the issue of subject matter jurisdiction over the person for some incarceration was neither raised nor before the Court. The only issue was the severity of incarceration as to an indictment that clearly conferred subject matter jurisdiction over the

It is clear that the underlying premise of the constitutional protection of a grand jury and the right to grand jury indictment incorporates the necessity of a specific reference in the indictment of a statutory substantive criminal offense of *incarceration* in order for the court to have the jurisdiction, i.e., "statutory or constitutional *power*" to incarcerate the individual brought before it.

Accordingly, this court is obligated to correct a jurisdictional and constitutional error under such precedent as it is clear the district court lacked jurisdiction to actually incarcerate Mr. Plunk on the actual substantive statutory criminal offenses of incarceration for which he was allegedly sentenced. This Court must address this jurisdictional error and grant his motion under § 2255. In the alternative, Mr. Plunk should be granted a certificate of appealability in order to be heard by the appellate courts on the issue of the constitutionally defective indictment.

D. Detective Speziale's Testimony as an "Expert" to his Trial-Held Opinion and Interpretation of the Alleged Meaning of the Precise Words on the Tapes and in the "Drug Ledger" (and the Mental State and Criminal Acts and Intent of the Defendant) was a Violation of the District Court's Duty and Function Under Daubert and Kumho Tire, and Denied Mr. Plunk his Due Process, Fair

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person. Here, while there was clearly subject matter jurisdiction for purposes of punitive criminal forfeiture of Mr. Plunk's property, there was none conferred by the indictment to try, convict, or incarcerate his person and thus the issues are preserved, presented, and cannot be ignored. The bottom line is there never was and still is no jurisdiction to justify Mr. Plunk's incarceration for two life terms. His forced residence in a government cage is unconstitutional and he is entitled to immediate release, a remedy which is neither substantively nor procedurally barred and in fact is precisely the reason the ancient writ of habeas corpus exists and was bequeathed us by the constitution and our forefathers. Such right to release from unconstitutional incarceration is the underpinning and heart of the writ and is never waived. See, e.g., Louisville and Nashville R. Co. v. Mottley, 211 U.S. 149 (1908) (defects in subject matter jurisdiction require correction regardless of whether the error was raised in district court).

Trial, and Counsel and Confrontations Rights.[18]

There clearly was no basis for Detective Speziale to qualify as an expert to render a scientific opinion under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and the panel's finding that he was an "alternative expert" in the field of "specialized knowledge" under Rule 702 may not be used to emasculate the Daubert ruling.

In Kumho Tire Co. v. Charmichael, 526 U.S. 137 (1999), this Court eliminated the "scientific/non-scientific" distinction. Accordingly, a complete Daubert/Kumho Tire analysis was required prior to admission of Detective Speziale's testimony, and failure to do same in light of the strenuous objections of counsel and requests for same violated Mr. Plunk's rights to cross-examination, confrontation, to due process, to a jury trial, to effective assistance of counsel, and to the protection of an oath under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

As the panel opinion in Plunk II conceded, Speziale's testimony was not harmless error and in fact was significant in the jury's mind.[19] "The decoded words and phrases provided by Speziale's testimony carried tremendous probative value ..." 153 F.3d at 1019 (emphasis added).

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[18] The district court did not address the merits of this claim in the § 2255 Plunk III proceedings, ruling that the issue was barred by the relitigation doctrine. Report and Rec. [App. 106]. While Mr. Plunk did raise this issue in the district court, (see Motion in Limine by Defendant Plunk to Prohibit Non-Experts from Offering Opinion Testimony [App. 196]) and again in his direct appeal, (see, Plunk II, 153 F.3d at 1017), the intervening law enunciated by this Court in Kumho Tire Co. v. Charmichael, 526 U.S. 137 (1999), requires this point be addressed on the merits in the § 2255 proceedings. Polizzi, 550 F.2d at 1135-36 (9th Cir. 1976) (relitigation not barred where there is a change in law).

[19] The jury hung or acquitted on other counts, notwithstanding the testimony of seven cooperating witnesses who had deals with the prosecution, and only convicted on counts relating to the wire tap words as to which Speziale improperly testified as to the ultimate issue of criminal acts and intent.

To allow a biased witness to present such "junk science" as an "expert" abrogates the duty and function of the trial court under Daubert and Kumho Tire to serve as a "gatekeeper" to protect the jury from such improper and non-scientific evidence.

This Court has recognized the threat to Daubert presented by the "specialized knowledge" Rule 702 exception in Kumho Tire. Obviously, where liberty is at stake as in the instant matter, the implication from such a threat to the integrity of criminal jury fact finding and procedure are even more important and frightening and thus cry out for a grant of Certiorari and reversal.

While recognizing Daubert would not allow this testimony, the panel held Speziale could testify as an expert with "specialized knowledge." Plunk II, 153 F.3d at 1017.

The most Det. Speziale should have been allowed to testify to was that his experience in such field of "specialized knowledge" included encounters with criminal practices (use of words) that are "consistent with" the referenced code words and he should not have been allowed to testify that his trial-held "expert" opinion (which was colored by post-arrest debriefing of co-conspirators) was that the words in fact were of criminal activity so as to testify to an opinion of the defendant-speaker's criminal state of mind in violation of Evidence Rule 704(a).

Moreover, the panel incorrectly rejected the defendant's claim that Evidence Rule 704(a) as interpreted in United States v. Morales, 108 F.3d 1031 (9th Cir. 1997; en banc) precluded such testimony as to the mental state of Mr. Plunk, to wit: what his intent was at the time of allegedly using the words in question. Opinion at 153 F.3d at 1018. Without question, his testimony would not have withstood muster under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The panel overlooked material facts and issues of law in holding that Speziale's testimony "constitutes specialized knowledge of law enforcement, not scientific knowledge." Plunk II, 153 F.3d at 1017.

E. Failure to Consider Parity in Sentencing Violated Due Process and Equal Protection.

Mr. Plunk argued at sentencing that under Koon v. United States, 518 U.S. 81 (1996), the court must determine based upon the facts of the case whether or not it was appropriate to depart downward in light of the significant disparity in sentencing between Mr. Plunk and the rest of his co-defendants. Transcript of Sentencing Proceedings [App. 205; 211-14] This was and is especially true as to the co-defendant Pierson who the district court felt was similarly situated[20] and as to the issue of the entered upward adjustment for obstruction of justice by Mr. Plunk, for testimony given at the request of Mr. Pierson, who was not subjected to such an upward adjustment. This argument was again presented to the district court via an appropriate motion under Fed. R. Crim. P. 35. Finally, appropriate argument was made at the Ninth Circuit level as to the inappropriate disparity between sentences in connection with the argument with regard to the enhancement for obstruction of justice.

Counsel for Mr. Plunk argued at sentencing Koon "change[d] the whole landscape" and "trumped" the Ninth Circuit authority upon which the court relied. Transcript of

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[20] The court stated at sentencing that even if he could consider parity in sentencing the only co-defendant he felt was similarly situated was Timothy Pierson, who at that time was sentenced to 324 months, and the court failed to see a meaningful distinction between a life sentence for a 47 year old man, and a 324 month sentence. Pierson's sentence was later reduced via a motion by the Government. See, n. 20 infra. Contrary to the court's comments at sentencing, there is in fact a substantial disparity between even the 27 years of Mr. Pierson's initial sentence (level 41) and Mr. Plunk's concurrent life sentences without parole. At the time of Mr. Plunk's sentencing, he was 47 years old, and even with no parole as to the 27 years, given pre-sentencing incarceration and goodtime, he could expect release at the approximate age of 68 as opposed to a true life incarceration without parole he now endures. Likewise, the sentence substantially impacts his classification, forcing him to endure incarceration in the severe conditions of maximum security federal prison (where he now resides) with attendant consequences regarding gang violence, inmate murders, lockdowns, etc.

Sentencing [App. 211] The court rejected this argument, and erroneously continued to apply United States v. Mejia, 953 F.2d 461 (9th Cir. 1992) cert. den'd, 504 U.S. 926 (1992), which held departure from the guidelines to equalize disparate sentences was not permitted. Transcript of Sentencing [App. 206-07; 218]

Subsequently, the Ninth Circuit agreed that Mr. Plunk's position was correct that Koon overruled Mejia.

> Downward departure to equalize sentencing disparity is a proper ground for departure under the appropriate circumstances. See 28 U.S.C. § 991(b)(1)(B); U.S.S.G. Ch. 1, Pt. A, p.s. 3. Indeed, a central goal of the Sentencing Guidelines is to eliminate sentencing disparity. See Koon, 518 U.S. at 113, ("The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach towards the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice.").
> U.S. v. Daas, 198 F.3d 1167, 1180-81 (9th Cir. 1999) (emphasis added.).

The Ninth Circuit went on to hold the sentencing court has the authority to depart downward based on sentencing disparity, and must determine whether the facts warrant departure. Id. at 1181. In that regard, the court should have taken into account the sentences of all of Mr. Plunk's co-defendants for parity, paying specific attention to the new evidence as to Mr. Pierson's significantly reduced sentence.[21]

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[21] Mr. Pierson was originally sentenced to 324 months. In July 1998, Mr. Pierson's sentence was reduced via motion by the Government under § 5K1.1 of the Sentencing Guidelines, Fed. R. Crim. P. 35, and 18 U.S.C. § 3553(e), as a direct result of Mr. Pierson's testimony at Mr. Plunk's sentencing, to 151 months. Despite the fact that previously the district court had been of the opinion that such reduction was not possible, see, Sentencing Transcript [App. 216-17], the court granted the motion and entered a new judgment reducing the sentence to 151 months. Mr. Plunk's sentence should be compared to Mr. Pierson's reduced sentence. Note further, Mr. Serrato, who was one of the

See, United States v. Caperna, 251 F.3d 827, 831-32 (9th Cir. 2001) (departure based on sentence disparity among cooperating and non-cooperating defendants appropriate).

The district court in Plunk III misconstrued the U.S. v. Schlesinger, 49 F.3d 483 (9th Cir. 1995), cite in holding that Mr. Plunk had not properly preserved this issue on direct appeal. Report and Rec. [App. 101; 103] The teaching of Schlesinger is the trial court must have been on clear notice of the disparity argument in an earlier proceeding, i.e., via clear objections at sentencing or on a Rule 35 motion. Schlesinger, 49 F.3d at 485 ("A contemporaneous objection to the alleged error by means of a Rule 35 motion may be sufficient to preserve the issue for [] review under § 2255.")

Counsel clearly argued to Judge Sedwick at sentencing and cited Koon as changing the landscape, and further, Judge Sedwick treated that issue in his denial of the Rule 35 motion as being raised.[22] The magistrate attempted to distinguish the grounds for Plunk's Rule 35 motion from a clear argument for parity in sentencing, or downward departure for disparity in sentencing. Report and Rec. [App. 102] However, given Judge Sedwick's reliance on Mejia, it is clear this issue was in fact raised by Plunk and is therefore not procedurally defaulted.

In light of the constitutional implications of Koon and the recognition by the Ninth Circuit in Daas that parity in sentencing is a valid consideration, and the fact that the most similarly situated defendant in the sentencing court's eyes, i.e. Mr. Pierson, is now serving a 151 month sentence while Mr. Plunk is serving two concurrent life sentences, Mr.

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admitted "Columbian Masterminds" of the conspiracy with significantly more involvement, supervisor authority, and actual culpability for distribution of the cocaine (and profit therefrom) as opposed to Mr. Plunk who was only alleged to have facilitated transport for minimal proceeds, received a sentence of only 14 months.

[22] "The rationale for not focusing on equality in the sentencing of co-defendant's is well articulated in United States v. Mejia, 953 F.2d 461, 468 (9th Cir. 1991)." Order denying Plunk's motion under Fed. R. Crim. P. 35(c), A94-036 CR (JWS) Docket 432 at 1-2.

Plunk's due process and equal protection rights were violated by the district court's failure to consider parity when urged to do so at sentencing by defense counsel, and accordingly relief must be granted under 28 U.S.C. § 2255.

IX. SUMMARY AND CONCLUSION.

The forfeitures of Mr. Plunk's property were tactically, factually, statutorily and procedurally directed at him in personam, based on the same evidence and offenses for which he was facing indictment and trial, and instituted for strategic reasons so as to gain procedural advantage, "force a fight on two fronts," and present Mr. Plunk with a "Hobson's choice." In light of Ursery, given the "purpose and effect" of the forfeitures were punitive and in personam, double jeopardy precludes the subsequent criminal prosecution and punishment of Mr. Plunk.

The constitutionally defective indictment, and absence of pleading in same or a grand jury true bill finding of the elements of a criminal offense of incarceration, failed to confer jurisdiction on the district court to convict or incarcerate Mr. Plunk.

Failure to apply Daubert or Kumho Tire to a purported expert's improper and invalid testimony on the alleged precise meaning (and thus conduct) of code words, i.e., as to the ultimate issue of criminal acts and intent, heavily relied upon by the jury in rendering a verdict, violated Petitioner's due process, equal protection and jury trial rights.

Failure to consider parity in sentencing violated Petitioner's due process and equal protection rights enunciated in Koon.

The Court should grant Certiorari and reverse.

Respectfully submitted this 18th day of April, 2003.

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